STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2014
v	No. 314808 Gratiot Circuit Court
GARY LEE HUMMEL, JR., Defendant-Appellant.	LC No. 12-006590-FH

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 3 to 15 years' imprisonment. He appeals as of right. Because the evidence of defendant's demeanor following the assault was properly admitted as part of the res gestae of the offense and defendant has not shown plain error arising from the prosecutor's closing arguments, we affirm.

The victim lived in an apartment building next door to defendant's trailer. The victim testified that in August 2012 defendant almost hit her car while he was riding a snowmobile. When she approached defendant and asked him to keep the snowmobile in his yard, defendant began yelling at her and the two argued for a few minutes. The victim walked back to her apartment and defendant went back to his trailer. The victim testified that, before she entered her apartment, she turned back around and saw defendant approaching, carrying a hatchet. As defendant swung at the victim with the hatchet, she raised her arm to block the blow and defendant caught her in the elbow with the hatchet. The victim testified that defendant then began to hit her apartment building, as well as something on his own porch, with the hatchet. Police arrived shortly thereafter. Officers testified that defendant appeared intoxicated.

Defendant was arrested and placed in the back of a police car to be transported to the county jail. An in-car camera captured defendant's actions while he was in the car. In the video, defendant appeared belligerent and berated the police officer driving the car. At one point, defendant intentionally hit his head on a glass divider, resulting in a large cut. At trial, the prosecution presented portions of the video to the jury over defendant's objection. The prosecution also elicited testimony from the police officer regarding his transport of defendant.

On appeal, defendant argues that the trial court erred in admitting the evidence of his transport to jail. Defendant offered a timely objection to the introduction of the video at trial,

arguing that it was irrelevant, cumulative, and prejudicial. He has thus preserved his objection to the admission of the video on these grounds. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, on appeal, defendant also argues that the video depicted other bad acts, making it inadmissible under MRE 404(b), and he challenges testimony from a police officer regarding his actions during the transport. Having failed to object to the police officer's testimony, or to raise his MRE 404(b) argument before the trial court, defendant has failed to preserve these claims for review. MRE 103(a)(1). See also *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) ("[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.").

To the extent defendant preserved his objections to the video, our review is for an abuse of discretion. *Aldrich*, 246 Mich App at 113. "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Where an evidentiary decision involves a preliminary question of law, such as whether a rule of evidence precludes the admission of evidence, our review of the question of law is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

Contrary to defendant's arguments, the video evidence was relevant and admissible as part of the res gestae of the crime. "Res gestae are circumstances, facts and declarations which so illustrate and characterize the principal fact as to place it in its proper effect." *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981). In other words, the res gestae supplies the jury with the "complete story" so that the jurors might be better equipped to perform their sworn duty. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Among evidence admissible as part of the res gestae, "[i]t is elementary that the acts, conduct, and demeanor of a person charged with crime at the time of, or shortly before or after, the offense is claimed to have been committed, may be shown as part of the res gestae." *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923). Further, under the doctrine of res gestate, evidence of other bad acts is admissible when it explains the circumstances surrounding the offense. *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010).

In this case, the video in question depicted defendant's agitated, even violent demeanor in the squad car, shortly after his attack on the victim. In these circumstances, the video provided the jury with the "complete story" surrounding defendant's conduct and formed part of the res gestae of the offense. The trial court aptly explained the video's significance in this regard, stating that it "goes along [sic] ways to explaining how such an offense could be committed, given the absence of any provocation." In short, as evidence of defendant's demeanor and conduct shortly after the felonious assault, the video informed the jury of the complete story surrounding defendant's conduct and, as part of the res gestae of the offense, it was admissible.

For similar reasons, contrary to defendant's arguments, the video was clearly relevant within the meaning of MRE 401. MRE 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The trial court appropriately explained the video's relevance, stating: "the agitated state and conduct of the defendant at or near the time of the alleged assault is relevant to whether

or not he committed the offense alleged." In other words, it is reasonable to infer from defendant's emotional state and violent demeanor, contemporaneous to the time of the assault, that defendant had also acted with violence during the confrontation with the victim. In short, the video provided the jury with a complete version of evidence and, in doing so, it tended to make defendant's commission of the actus reus of the crime more probable. Thus, the evidence was relevant.

We also conclude that, contrary to defendant's arguments, the evidence was not unfairly prejudicial under MRE 403. Pursuant to MRE 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "[A]ll evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, (1995); mod on other grounds 450 Mich 1212 (1995). For evidence to be unfairly prejudicial under MRE 403, it must "adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (quotation omitted).

As discussed above, the video was relevant to a fact in issue. Moreover, the evidence had significant probative value and was not unfairly prejudicial to defendant. The video depicted defendant acting in a violent and uncontrolled manner contemporaneous to the charged assault, which apparently stemmed from a request to be careful about driving a snowmobile. Rather than inject extraneous considerations, the video spoke directly to defendant's behavior around the time of the charged assault, making it more probable that he had committed the offense. It was thus highly probative and, on the facts of this case, any prejudice to defendant cannot be characterized as "unfair." Thus, the video's admission was not precluded by MRE 403.

In making his MRE 403 argument, defendant also challenges the video's admission by asserting that his demeanor could have been established by eyewitness testimony. However, there is no rule requiring the prosecution to use only the least prejudicial evidence to establish facts. *Fisher*, 449 Mich at 452. Further, MRE 403 does not bar the presentation of cumulative evidence per se, but rather the "*needless* presentation of cumulative evidence" (emphasis added). Regarding photographs, our Supreme Court has observed, "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Mills*, 450 Mich at 76. In fact, "[p]hotographs may also be used to corroborate a witness' testimony." *Id*. Analogously, the video in this case was not inadmissible merely because a witness could describe defendant's demeanor. Rather, the video corroborated witness testimony and provided a clear means of demonstrating defendant's behavior at the relevant time. It was not needlessly cumulative and did not need to be excluded on this basis.

Regarding defendant's challenge to the testimony provided by a police officer in relation to defendant's demeanor in the squad car, his claim is, as noted, unpreserved. Unpreserved evidentiary issues are reviewed for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Under this standard, defendant bears the burden of

demonstrating the occurrence of a "clear or obvious" error and that this error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has not met this burden. The police officer's testimony regarding defendant's conduct in the squad car, like the video, was part of the res gestae of the offense and was thus admissible. This testimony was, for the same reasons as the video, relevant under MRE 401 and not excluded under MRE 403. In short, defendant has not shown plain error in the admission of this testimony and he is not entitled to relief on this basis.

Next, defendant also challenges the admission of the evidence relating to his demeanor in the squad car based on the contention that it constitutes evidence of other bad acts inadmissible under MRE 404(b). As we have discussed, this evidence—both the video and testimony on the subject—was admissible as part of the res gestae of the offense. Given that the evidence formed part of the res gestae of the offense, its admission was not dependant on MRE 404(b) and thus defendant's arguments are without merit. See *Malone*, 287 Mich App at 661-662; *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

In any event, were we to consider defendant's unpreserved claims under MRE 404(b), defendant has failed to establish that the court plainly erred in admitting the video and accompanying testimony under MRE 404(b). MRE 404(b)(l) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) does not bar evidence of a defendant's uncharged bad acts in general, but rather only in one circumstance: "If the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). In other words, MRE 404(b)(1) should be viewed as "a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). When evaluating the admission of evidence under MRE 404(b), it must be offered for a proper purpose, it must be relevant under MRE 401, it must satisfy MRE 403, and, if requested, a limiting jury instruction should be given. *VanderVliet*, 444 Mich at 74.

Here, as stated above, the trial court appropriately admitted the video and police testimony as evidence of defendant's agitated and irrational demeanor in order to demonstrate how it could be that defendant attacked the victim on so little provocation. It was, in other words, offered to prove defendant's state of mind, a proper purpose for which other acts evidence may be offered in keeping with MRE 404(b). See *People v Gilbert*, 101 Mich App 459, 473; 300 NW2d 604 (1980). As discussed, the evidence was relevant within the meaning of MRE 401 and not excluded by MRE 403. Lastly, although the trial court did not read a limiting

instruction, defendant failed to request such an instruction and the trial court did not have a duty to sua sponte provide one. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Thus, on these facts, assuming arguendo the contested evidence was subject to MRE 404(b), the trial court did not plainly err in allowing its admission.

In addition, defendant argues that the trial court erred in allowing the prosecution to offer the video and accompanying testimony without first providing the notice required by MRE 404(b)(2). Because the prosecutor offered the evidence as part of the res gestae of the offense, and not as other acts evidence pursuant to MRE 404(b), the prosecution was not required to provide the notice described in MRE 404(b)(2). See *Malone*, 287 Mich App at 662. Even if MRE 404(b)(2) applied, defendant failed to raise his notice argument in the trial court, meaning his claim is unpreserved and reviewed for plain error, *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001), and defendant has not met his burden under this standard.

MRE 404(b)(2) requires the prosecution in a criminal case to "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence." Failure to give the required notice generally constitutes error. *Hawkins*, 245 Mich App at 455. However, under the plain error standard, reversal is not required where notice would not have had an impact on the evidence's admission and a defendant does not demonstrate how he would have reacted differently to the evidence if notice had been provided. *Id.* at 455-456.

In this case, the evidence was admissible and defendant offers no suggestion regarding how notice would have affected the proceedings. That is, defendant contends that "[n]otice would have alerted defense counsel to the prosecutor's intentions and given counsel time to formulate a response." However, he makes no effort on appeal to explain what response counsel could have formulated that could have altered the outcome of the proceedings. Indeed, it is clear that defendant was aware of the prosecution's intent to present the video and accompanying testimony before it was presented. At trial, defense counsel indicated that he had viewed the entire video and he in fact filed a motion to preclude the video's admission. On these facts, lack of notice did not affect the outcome of the proceedings and defendant has not shown plain error.

Next, defendant argues that the prosecutor committed misconduct during closing argument by arguing that the video showed that defendant was a bad person. Defendant failed to object to the prosecutor's remarks, meaning his claim is reviewed for plain error. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Under this standard, defendant must show that there was a clear or obvious error which affected his substantial rights. *Carines*, 460 Mich at 763. Even if plain error is found, reversal is not required unless the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764. Further, we will not find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

In the present case, the prosecutor stated during closing arguments that:

> [T]he second reason that we played this is you might be thinking what kind of person would attack a neighbor with an ax. And the answer to that question is the same kind of person who rides a snowmobile in August around the neighborhood, the same kind of person—
>
> (At 2:34 p.m., video commenced)
>
> (At 3:34 p.m. [sic], video concluded)
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> —the same kind of person who doesn't respect his own body, why would we expect that he is going to respect his neighbor's? He's a bad drunk, he shouldn't drink. And when he drink's, he becomes mean, he becomes abusive, and he attacked his neighbor, who is simply saying don't hit my car.

Contrary to defendant's arguments, in context, these remarks were not an assertion that defendant generally had a bad character or a propensity toward criminal conduct, but an argument that he was out of control on the specific day in question. That is, the prosecutor reasonably argued, consistent with the evidence, that defendant's agitated demeanor and irrational behavior close in time to the charged offense helped to explain why defendant so grossly overreacted and assaulted his neighbor with a hatchet.

Even if we accept that the remarks went too far and urged the jury to convict based on defendant's character, we nevertheless conclude that reversal of defendant's conviction is not required because a curative instruction could have alleviated any prejudicial effect. *Ackerman*, 257 Mich App at 449. Indeed, the jury was in fact instructed that the lawyers' statements were not evidence, thereby curing any prejudice caused by the prosecutor's remarks. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Further, there was substantial evidence of defendant's guilt, including the victim's testimony regarding the attack and her injury consistent with her testimony. Also consistent with the victim's version of events, a neighbor witnessed defendant run at the victim with a hatchet, another witness observed defendant "chopping on stuff a little bit" by his trailer after the assault, and a police officer testified that he found "freshly chopped marks" on defendant's front porch. In the face of this substantial evidence, the prosecution's argument did not prejudice defendant and thus he is not entitled to relief.

Lastly, to the extent defendant argues that the cumulative effect of errors entitles him to relief, we have not found that multiple errors occurred. Consequently, there can be no cumulative effect and his claim is without merit. *People v Dobek*, 274 Mich App 58, 106-107; 732 NW2d 546 (2007).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter